

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 404 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

PADHIR VALJI BAPUJI

Versus

DHARBEN BAPUJI LEGAL HEIRS OF DECEASED BAI AMBI W/O OF BAPUJ

Appearance:

MR DD VYAS for Petitioner

MR PS CHAMPANERI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 5/05/98

ORAL JUDGEMENT

#. This is plaintiff's second appeal.

#. The brief facts giving rise to this appeal are that the plaintiff appellant filed a suit for declaration and permanent injunction on the allegation that the land in dispute is owned by the plaintiff, the defendant No.1 and the defendant No.2. It is said to be joint property of these persons. It was alleged that the defendants

No.1 & 2 without consulting the plaintiff sold the suit land to the defendant No.3. The plaintiff on coming to know of the transaction, sent a notice to the defendants No.1 & 2. The defendant No.3 had started digging the foundation over the land purchased by him. It was further alleged that the defendants No.1 & 2 had no right to execute sale deed in respect of joint property in favour of the defendant No.3. It was also pleaded that the plaintiff appellant had right of pre-emption for purchasing the share of the defendants No.1 & 2 in the joint open land being one of the co-owners of the joint land. As such the sale deed executed by the defendants No.1 & 2 in favour of the defendant No.3 was said to be invalid and void. Consequently, a declaration was sought by the appellant that the suit land is in joint ownership and possession of the plaintiff and the defendant No.1 & 2 and for further declaration that defendant No.3 has no right to disturb the possession of plaintiff in the suit land. Permanent injunction was also sought restraining the defendant No.3 from disturbing plaintiff's possession over the disputed land.

#. This suit was contested on the ground that no doubt the property was originally joint property of the plaintiff and the defendants No.1 & 2. But it was subsequently partitioned and the defendants No.1 & 2 had sold their share towards south which was allotted in the private partition and the defendant No.3, the purchaser from the defendants No.1 & 2 is in possession of the southern half portion of the land in dispute. Consequently it was prayed that the suit for declaration and injunction is liable to be dismissed. It was also pleaded that the plaintiff has no right to claim pre-emption.

#. The trial court found that the suit property was joint property of the plaintiff and the defendants No.1 & 2 and that the sale of share in the joint property by defendants No.1 & 2 in favour of the defendant No.3 is illegal. Accordingly, the suit was decreed and declaration as well as the injunction prayed for was granted.

#. An appeal was preferred. The lower appellate court reversed the judgment and decree of the trial court and dismissed the suit, it is therefore this second appeal.

#. The following substantial questions of law were formulated in this second appeal.

- (1) Whether it is proved that the property was already partitioned between the plaintiff and the defendants No.1 & 2 ?
- (2) Whether the sale of the suit property by the defendants No.1 & 2 is legal ?
- (3) Whether the plaintiff has proved his right of pre-emption over the suit property ?

#. The learned counsel for the parties were heard and the judgment of the two courts below on record were also examined.

#. Coming to the question of appellant's right of pre-emption, both the courts below have found that the appellant failed to allege and prove the formalities required for establishing the right of pre-emption. The finding of the trial court on Issue No.7 is summary finding. However, detailed finding was recorded by the lower appellate court which from the pleadings and evidence of the plaintiff concluded that there was no allegation in the plaint that the plaintiff performed requisite formalities for claiming the right of pre-emption and that there was no evidence from his side to claim such right of pre-emption. The lower appellate court has also discussed Section-231 & 236 of Mulla's Mohomedan Law.

#. The principle of Mohomedan Law by Mulla, 19th Edition provides in Section-231 as to who can claim pre-emption. Under this section, inter alia the co-sharer in the property is entitled to claim pre-emption. Admittedly, initially the property was joint property, as such, so long as the property was joint, the plaintiff being a co-sharer could have claimed pre-emption. However, there is finding by the lower appellate court that the partition took place between the parties and it was private partition not evidenced by any registered partition deed. If the partition had taken place then on the date of the sale deed executed by the defendants No.1 & 2 in favour of the defendant No.3, the plaintiff was not the co-owner or co-sharer of the property hence he had no right to claim pre-emption.

##. Even if for the sake of arguments, it is presumed that there was no partition, it has to be seen whether in view of Section 236 of Principles of Mohomaden Law by Mulla, aforesaid requisite demand for pre-emption was made by the appellant or not ? This section provides that no person is entitled to the right of pre-emption

unless he has declared his intention to assert the right immediately on receiving information of the sale and also unless he with the least practicable delay affirmed the intention referring expressly to the fact that declaration of intention was made and he has made formal demand either in presence of buyer or seller or on the premises which are subject matter of sale and in presence of atleast two witnesses. The lower appellate court from the evidence on record and also from the plaint of the appellant concluded that neither there was an averment of compliance of these formalities nor there is evidence that these formalities were performed by the appellant. Consequently, the appellant was not entitled to claim right of pre-emption so as to invalidate the sale deed in favour of the defendant No.3. Substantial question No.3 is therefore answered in negative.

##. Coming to the first substantial question, the case of the appellant is that the property was joint property of himself and the defendants No.1 & 2. The stand of the defendants No.1 & 2 was that no doubt the property was joint property but it was subsequently partitioned and separate shares were allotted. It is that northern portion having half area of entire land was given to the plaintiff appellant and half of the southern land was given to the defendants No.1 & 2. The title of the predecessor of the plaintiff was also traced through document on record. The sale deed was taken into consideration by the lower appellate court and from the said sale deed, it came to the conclusion that half of the area towards the south was sold by the defendants No.1 & 2 to the defendant No.3. There is also finding of the lower appellate court that the private partition was acted upon. The lower appellate court has thus, disagreed with the finding of the trial court that no partition by metes and bounds took place between the plaintiff and the defendants No. 1 & 2. Such reversal of finding by the lower appellate court does not require interference in second appeal in as much as finding whether partition took place or not is finding of fact and this finding is based on proper appraisal of oral and documentary evidence on record. The finding recorded by the lower appellate court in these circumstances, cannot be said to be perverse.

##. I have gone through the judgment of lower appellate court. It is not very safe to place reliance upon the finding of lower appellate court that the plaintiff had relinquished his interest in the property and as such he has no right in said property. This finding is contradictory because in subsequent portion of

the judgment, the lower appellate court has held that the plaintiff in private portion got half of the land towards north.

##. The lower appellate court also considered the sale deed Ex.53, in which land admeasuring 274 sq.yard x 6 sq.ft. was sold to the defendant No.3. This measurement was found practically half of the entire area of the land in dispute. From Ex.69, the trial court further came to the conclusion that the entire plot was divided into two portions, one towards north and other towards south. The southern portion had gone to the share of the defendants No. 1 & 2 and the northern portion to the share of the plaintiff. The northern boundary of the land sold through Ex.53 is shown as land of Valiji who is none else than the plaintiff. It is clear from the sale deed Ex.53 that not only there was partition by metes and bounds but the share allotted to the plaintiff appellant was towards north in the said sale deed executed in favour of the defendant No.3. Oral evidence of the plaintiff was also considered by the lower appellate court. The plaintiff in examination in chief stated that half plot was sold to the defendant No.3 and that was southern side of the plot. He further stated that he was given half plot towards north. This therefore suggests private partition as averred by the defendants. Admission is best piece of evidence and it can be relied upon against the plaintiff unless it is proved to be erroneous. Admission in the witness box made by the plaintiff is best evidence on partition and there was no attempt from his side that such admission during examination in chief itself was erroneous and mistaken. The learned counsel for the appellant however contended that the defendant No.2 admitted in cross examination that the disputed plot has not been partitioned and this admission was not considered by the lower appellate court. The trial court in its judgment has referred in Para-17 that the defendant No.2 has admitted in cross examination that the disputed plot has not been partitioned. However, he further stated that his half portion was kept separate and half part belonging to him was sold and plaintiff's half portion was also kept separate. This statement has to be read as a whole and not in piecemeal. The only intention in making such statement is that though technically, there was no partition yet shares were separated and half share allotted to the defendants No.1 & 2 was sold to the defendant No.3. This is nothing but statement suggesting partition. Partition by metes and bounds is nothing but separation of share. It cannot be said to be mere an arrangement. In any event such private arrangement

defining separate shares and co-sharer occupying their shares so defined will be deemed to have partitioned the joint property by metes and bounds. The finding of the lower appellate court that private partition did take place between the plaintiff and the defendants No.1 & 2 is therefore not vitiated nor it can be said to be perverse.

##. In view of the above discussion, substantial question No.1 is answered in affirmative.

##. Coming to the substantial question No.2 if the property was partitioned privately amongst the co-sharer and southern half portion was given to the defendants No.1 & 2 and they sold the same to the defendant No.3, the sale deed is perfectly legal and valid. It may be also mentioned that co-sharer is entitled to sell his undivided share in the property. However, if such sale is made, the purchaser cannot enter in possession of his specific portion unless he seeks partition. However, in the case under consideration, the sale deed was in respect of southern portion and as such the sale deed cannot be invalidated. The third substantial question is also answered in affirmative.

##. In view of the aforesaid discussions, the plaintiff appellant was not entitled to the declaration prayed for.

##. So far as the relief of injunction is concerned, there is no allegation that the defendant No.3 after purchasing the southern portion of the plot in dispute had at any time interfered with plaintiff's northern half portion of the suit land. As such there was no occasion for granting for permanent injunction. No court will grant redundant injunction. The plaintiff is not entitled to claim injunction in respect of entire land in view of private partition.

##. Consequently the lower appellate court was justified in dismissing the suit. There is no merit in this appeal which is hereby dismissed. In these circumstances of the case, parties shall bear their own costs.

(KPP)